Supreme Court, U. S.
FILED
JAN 3 1979
MICHAEL RODAK, JR., CLERK

78-1068

IN THE

Supreme Court of the United States

October Term, 1978

No. [redacted]

COMMONWEALTH OF PENNSYLVANIA

vs.

HUGH FANT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of Case	3
Reasons for Granting Writ	7
Conclusion	13

TABLE OF CASES:

CASES	PAGE
Manson V. Brathwaite 432 V.S. 98, 97 S.CT. 2243, 53 L. Ed 2d 140 (1977)	11
Neil V. Biggers 409 V.S. 188, 93 S.Ct. 395, 34 L. Ed 2d 401 (1922)	8
Simmons V. United States 390 V.S. 377, 88 S.Ct. 967, 19 L. Ed 2d 1247	8
United States V. Wade 388 V.S. 218, 87 S. Ct. 1926, 18 L. Ed 2d 1149 (1967)	8

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on October 5, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at ..... Pa. ....., 391 A2d 1040 and is printed in Appendix A hereto, infra, page A-1 et seq.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 5, 1978. The jurisdiction of the Supreme Court is invoked under 28 V.S.C. Section 1257 (3), as the decision of the Supreme Court of Pennsylvania rests entirely upon its interpretation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the Due Process required under the Fourteenth Amendment mandates that when no pre-trial identification procedures are used, all witnesses proposed to be called in a criminal prosecution to offer identification testimony must be sequestered prior to giving that testimony?

CONSTITUTIONAL AMENDMENT INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case is a criminal prosecution for the crime of criminal homicide. An indictment was returned by the Grand Jury of Fayette County against Defendant, Hugh Fant, at Criminal Action No. 1 of 1975, charging two counts of criminal homicide.

The Defendant was tried before a judge and jury. The trial on the charges began September 3, 1975, with verdicts returned September 23, 1975, the jury convicting Defendant of two counts of murder in the third degree as that is defined in the Crime Code of Pennsylvania, Section 2502, 18 Pa. C.S. Section 2502.

The evidence shows that the deaths occurred in the early morning hours of December 15, 1974. Two men, Bruce J. Fisher and John M. Schlosky, lost their lives because of gun shot wounds suffered during an incident at the Wishing Well Lounge, German Township, Fayette County, Pennsylvania. One of the deceased, Bruce J. Fisher, was a co-owner of the lounge.

In an incident during the evening of December 14, 1974, Hugh Fant, Jack A. Rodgers and Mark Collins attempted to purchase alcoholic beverages at the bar of the lounge. As they were under the legal age for drinking in Pennsylvania, all three were denied service and instructed to leave the premises. When they refused, Mr. Fisher physically ejected them from the lounge.

Once in the parking lot, Fant began yelling obscenities. When asked by another patron of the establishment to stop because there were ladies present, an altercation began. Attempts to stop the fighting were fruitless until Mr. Fisher directed mace toward Fant, his companions, and the others involved. Fant, Collins, and

Rodgers then entered a car to leave. Before they had left the parking lot area, however, one of the occupants of the car yelled that they would be back.

In approximately one-half hour, they were back, accompanied by James Lee Smith. Fant was now armed with a rifle and Smith with a hand gun. All except Collins, who remained at the outside door, entered the lounge. Once inside, Smith asked "Which one is Bruce, where is Bruce?" Fisher approached the group, at which time Smith questioned Fant's ejection from the bar. Rodgers then struck Fisher on the head with a beer bottle. As Fisher turned to leave the group, Fant brought his rifle to waist level and fired. The first shot struck Fisher in the back and he fell to the floor. Fant continued to fire and one shot struck a patron, John M. Schlosky. Both Fisher and Schlosky died as a result of the wounds.

Testimony concerning the autopsies performed on the two bodies indicated that the cause of death for both was gunshot wounds. Defendant himself never denied shooting Fisher or further discharging his rifle; the defense offered by Fant was that as no cranial autopsy was performed on Fisher, it was possible that the blow to the head delivered by Rodgers had been fatal and that Fisher was dead before he was shot.

The jury returned verdicts of guilty in the deaths of both victims. Timely post-verdict motions were filed, raising five issues: (1) error in denying a change of venue; (2) denial of Defendant; motion to have the jury sequestered from the time of selection to the panel; (3) improperly admitting testimony of Andrew T. Haky, the funeral director who performed the initial autopsy; (4) improper admission of the testimony of the pathologist who, in part, based his opinion as to cause of death in the report of Mr. Haky; (5) an abuse of discretion in denial of a defense motion to sequester, prior to their testifying, all prosecution witnesses who would either place Fant at the scene or testify that Fant actually did the shooting.

Rulings Below

The Court of Common Pleas of Fayette County, Pennsylvania, sitting en banc, denied the motions for new trial and in arrest of judgment. Sentence was imposed on the two verdicts, Defendant being ordered to serve two consecutive terms of imprisonment of ten to twenty years each. As this was a sentence imposed on a criminal homicide conviction, appeal from the sentence was directly to the Supreme Court of Pennsylvania, §202 of the Appellate Court Jurisdiction Act, Act of July 31, 1970, P.L. 673, No. 223, 17 P.S. §211.202. Such an appeal was timely filed, raising the same five issues raised on the post-verdict motions.

The Supreme Court of Pennsylvania announced its decision in the case on October 5, 1978. In that opinion, the Court, by a four to three vote, vacated the sentences and ordered a new trial. The Court considered only one issue, whether the trial court abused its discretion by refusing to order sequestation of the prosecution's identification witnesses. Two members of the Court, announcing its decision, ruled that the discretion of the Court was abused when sequestation was not ordered. The seventeen (17) witnesses who identified Fant as participating in the shooting made their first identification in open court. The Court ruled that, as there was no objective pre-trial identification procedure utilized

by the prosecution, sequestation was required to assure Defendant was afforded Due Process, as the incident identification amounted to a one-on-one confrontation between witness and accused. Two members of the Court concurred in the resulting order of a new trial.

Three Justices dissented, reading the lead opinion as penalizing the Commonwealth for failing to exercise a non-existent duty to utilize pre-trial identification procedures. The dissenting opinion also questioned the ruling as holding an identification suspect because it occurs in open court, which of recently, involves a one-on-one confrontation. The dissenters conclude by saying that such an identification is properly admissible, since it is observed by the fact finder who will ultimately determine the believability of such testimony.

It is from the order of the Supreme Court of Pennsylvania ordering a new trial in this case that review is sought.

REASON FOR GRANTING THE WRIT

I.

The decision of the Supreme Court of Pennsylvania decides a question of the interpretation of Fourteenth Amendment Due Process in a manner that is not in accord with the decisions of this Honorable Court.

In the instant case, the primary issue for resolution by the jury was the identification of the accused as the perpetrator. The contention made by Defendant, and accepted by the Supreme Court of Pennsylvania, was that the trial court committed an abuse of discretion in denying the pre-trial motion of the defense to sequester all witnesses who would offer identification testimony. Specifically, the Supreme Court of Pennsylvania ruled that the failure to sequester the witnesses resulted in the offering of identification testimony which could not be considered untainted.

Same seventeen (17) individual witnesses offered identification testimony. These witnesses included both employees and patrons of the Wishing Well Lounge, all of whom were present during the incident of December 14-15, 1974. These witnesses included same who had observed each of the three incidents in which Defendant was a participant during that time period. In every case, the witness stated that the testimony offered and the included identification was based entirely on observations made during that evening at the Lounge.

In fact, no pre-trial identification procedures were employed. None of the witnesses was shown photographs or participated in a line-up proceeding. The first proceeding at which identifications were made was dur-

ing the trial itself. The mere fact that seventeen separate witnesses all identified the accused as being present at and participating in the relevant incidents does not of necessity, taint the identifications made.

It is recognized that Due Process requires the exclusion of tainted identifications. *United States v. Wade,* 388 US 218, 87 S.Ct. 1926, 18 L Ed 2d 1149 (1967); *Simmons v. United States,* 390 US 377, 88 S.Ct. 967, 19 L Ed 2d 1247 (1968); *Neil v. Biggers,* 409 US 188, 93 S.Ct. 375, 34 L Ed 2d 401 (1972). All of these cases address testimony from witnesses who had participated *in* pretrial identifications, either photographic displays or lineups, found to be unnecessarily suggestive. The cases hold that in-court identifications may not be used unless it is shown that they are based on the witnesses' observations of the Defendant independent of the pre-trial procedures. Even if such a suggestive pre-trial procedure has been conducted, the identifications may still be admitted if an independent foundation is shown. The test involves an examination of the totality of the circumstances.

What the Supreme Court of Pennsylvania has said is that an identification may be improperly tainted, not only by overly suggestive pre-trial proceedings, but also by a failure to use some type of identification procedure prior to trial. That is an in-court identification may be tainted because the testimony of the witness contains his first identification of the accused with the taint arising simply because it occurs in court, which is essentially a one-on-one confrontation.

The Supreme Court, however, goes even further. It would appear that if but one witness were to offer identification testimony, the fact that no pre-trial identifications were made would not taint the testimony. However, if more than one witness is to testify on the issue and if none of the witnesses had participated in pre-trial procedures, then the testimony offered may be tainted from an additional source, *i.e.,* the reinforcement of subsequent witnesses identifications by the testimony of witnesses who have testified before. This, the Supreme Court ruled, violates due process, and requires sequestating the identification witnesses.

In essence, as the dissenting opinion of that Court says, the decision in the instant case puts on the prosecution an obligation to utilize pre-trial identification procedures when multiple witnesses are to testify concerning identification of the accused.

Therefore, unlike the above cited decisions of this Honorable Court, the instant case does not involve the admissibility of identification founded by suggestive and unnecessary pretrial procedures. Rather, the rationale of the Supreme Court of Pennsylvania is that no independent basis for identification testimony may be established by trial confrontation alone, to show an independent basis, the instant decision requires the use of some type of pre-trial identification procedure to test the accuracy and reliability of the identification to be offered.

Thus, the Supreme Court of Pennsylvania has rules on the basis of a due process agreement that an accused must first be identified by way of photographic array, lineup, showup, or some other efforts of identification prior to initiation of judicial proceedings. [It must be emphasized that one witness, who was the brother of Bruce Fisher and was present at the lounge for both incidents, supplied H. Fant's name to the police on the

basis of his independently picking a picture out of the year book of a high school named on a jacket worn by the accused during the incident.] Without utilizing such a procedure, no identification testimony apparently would be admissible.

Consequently, the Supreme Court of Pennsylvania ruled that due process required the sequestration of identification witnesses when more than one was to testify on that matter. Here, seventeen (17)) witnesses identified Respondent. Each described the incidents of the night in question and the basis for the proffered identification. Even though each witness testified that the basis of his testimony was his observations on the night of the crime, the Supreme Court of Pennsylvania ruled that due process was not met. Of course, none of the testimony was tainted by pre-trial procedures. Rather, it was held that the prosecution had not shown that the testimony was free from a taint arising from each witness being in the courtroom to observe the identifications made by prior witnesses. In other words, it was held that merely outlining each witness's opportunity to observe the events of the night in question and the lack of suggestive pre-trial identification procedures had not conclusively shown an independant basis for the identifications permitting admission of the testimony.

The ruling below, therefore, goes to establish what must be shown to establish an independent basis for identification testimony when no improperly suggestive procedures are used before trial. In such circumstances, the Court seems to require a showing of reliability of that testimony which goes beyond that required whenever improper pre-trial procedures are used. In its opinion, the Court directs that proof of an independent basis of a reliable identification can be shown only if, prior to trial, that identification has been tested in some type of non-suggestive procedure, e.g., a properly conducted line-up.

Such a holding is not in accord with the rulings of this Court. No requirement of conducting pre-trial identification procedures has been imposed on prosecuting offices. No such requirement is imposed even when admittedly overly suggestive and unnecessary identification procedures were utilized prior to trial tainting such testimony. *Manson v. Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d. 140(1977). There, this Honorable Court allowed a conviction to stand on the basis of the identification of the accused given by an undercover officer. The officer's testimony was admittedly tainted by his pre-trial identification of a single photograph shown him a short time after the crime. However, the testimony given by the officer also included his description of the sale of drugs from which the prosecution stemmed. From that the Court concluded that an independent basis for the identification testimony was made out, and that regardless of the taint, admission of the testimony did not violate due process.

In the instant case, the Court below in essence held that testimony such as that given by officer Glover in *Manson v. Brathwaite* was insufficient to establish an independent basis for an identification, even when there is no arguable taint in such testimony. Rather, the Supreme Court of Pennsylvania holds that due process requires some type of non-suggestive pre-trial procedure to establish such a basis, and that the failure to conduct such a procedure raises the inference of a taint

on identifications given by multiple witnesses. Such a holding goes well beyond what has heretofore been required by decisions of this Honorable Court, and the holding of the Supreme Court of Pennsylvania is, therefore, not in accord with the definition of due process established by the decisions cited above.

CONCLUSION

For the foregoing reasons, it is urged that this Honorable Court grant the petition for writ of certiorari and review the judgment and order of the Supreme Court of Pennsylvania.

Respectfully submitted,

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